IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979

CA 190/2010
HC/ VAVUNIYA/ 1947/2007

Nagalingam Chettiyar Kandasamy

Accused-Appellant

vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

Complainant-Respondent

BEFORE	:	**Devika Abeyratne J** **P. Kumararatnam J**
COUNSEL	:	**Mr J.Tenny C. Fernando for the Appellant.** **Mr.Chethiya Goonesekera SDSG for the Respondent.**
ARGUED ON	:	**03/02/2021**
DECIDED ON	:	**15/03/2021**

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JUDGMENT

P. Kumararatnam J

[01] The above-named Accused-Appellant (hereinafter after referred as the Appellant) was indicted by the Attorney General under Sections 54(A) (d) and 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Possession and Trafficking respectively of 1108.7 grams of Heroin on 08th December 2004 in the High Court of Vavuniya.

[02] After trial the Appellant was found guilty on both counts and the Learned High Court Judge of Vavuniya has imposed life imprisonment on both counts on 15th of November, 2010.

[03] Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

[04] The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to Covid 19 pandemic.

[05] On behalf of the Appellant following Grounds of Appeal are raised.

1. The Learned Trial Judge misdirected himself by failure to analyse the discontinuation of custody of production chain, that is a substantial fact, the prosecution shall prove beyond reasonable doubt and thereby the conviction is bad in law and unsafe.
2. The Judgment of the Learned Trial Judge is not in accordance with Section 283 of the Code of Criminal Procedure Act No.15 of 1979 on the basis that Learned High Court Judge misdirected himself by failure to analyse defence evidence in its proper legal context and thereby the conviction is bad in law.

[06] On 07/12/2004 IP Suresh Kumara Silva attached to Murunkan Police Station had received information from an informant about trafficking Heroin from Mannar to Colombo. As per the information an unidentified person travelling in a Colombo bound bus said to have been carrying the contraband. He with 07 other police officers attached to Murunkan Police Station had rushed to an existing road block at Parayanlankulam junction. While checking the buses passing by, the particular Colombo bound bus had reached the check point at 22.45 hours.

The bus had been stopped and the officers got in to the bus and carried out the search. While checking IP/Suresh Kumara had noticed the Appellant who was seated on the 5th seat from the driver's seat to be suspicious. Upon inquiry the Appellant had revealed his name and his destination. Two blue coloured normal size bags used to carry clothes, having the word 'Domex' on it and one inside the other were on his lap. When this officer opened the bags for checking found nothing but noticed the bottoms of the bags had been unusually elevated. Having felt suspicious, when he opened the elevated bottoms of the bags found two parcels wrapped by gum tape in each bag. When he opened the parcels found brown coloured powder in that parcels. As it smelled to be Heroin the Appellant was arrested and brought to the Murunkan Police Station.

At the Murunkan Police Station the parcels had been weighed by using a scale from police canteen. According to the police notes the first parcel weighed 1400 grams and the second parcel weighed 1800 grams. The parcels had been properly sealed and obtained thumb impression of the Appellant as well. The said two parcels had been registered under production No. 144/04 and produced to Mannar Magistrate Court with the Appellant.

Productions had been kept in the police station under different reserve duty officers before being taken to Magistrate Court, Mannar.

After obtaining court order, the productions had been handed over to Government Analyst Department on 09/12/2004.

[07] The prosecution led 07 witnesses including the Government Analyst, marked productions and closed the case. Defence was called and the Appellant preferred to give evidence from witness box and closed the case.

[08] In his evidence the Appellant took up the position that he never carried any bag or bags on the date of his arrest. The said bags were said to have recovered from baggage carrier of the bus. He denied the ownership of the same.

[09] In every criminal case the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person. In the case of this nature the prosecution not only need to prove the case beyond reasonable doubt but also ensure, with cogent evidence that the inward journey of the production has not been disturbed at the all-material point.

[10] In the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 held:

> *"A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences relation to drugs, we are of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions where the identity of the good analysis for examination has to be proved beyond reasonable doubt. A prosecutor should take pains to ensure that the chain of events pertaining to the productions that had been taken charge from the Appellant from the time it was taken into custody to the time it reaches the Government Analyst and comes back to the court should be established".*

[11] In the first ground of appeal the Appellant takes up the position that the Learned Trial Judge misdirected himself by failure to analyse the discontinuation of custody of production chain, that is a substantial fact, the prosecution shall prove beyond reasonable doubt and thereby the conviction is bad in law and unsafe.

According to chief investigation officer IP Suresh Kumara Silva, the substance found in the possession of the Appellant was weighted using a scale used in the police canteen. In the parcel P1-1400 grams of substance was found and, in the parcel, P2-1800 grams of substance was found.

However, when the productions had been taken to the Government Analyst Department a notable difference had been noted in both parcels. According to the Government Analyst Report which had been marked as P8 in the High Court Trial, the weight of parcel P1-mentioned as 1563 grams. This is 163 grams in excess to the original weight. The weight of parcel P2 mentioned as 1635 grams. This is 165 grams less than the original weight. Hence the Appellant argue that the weight difference could create a serious doubt in the prosecution case.

[12] In **Faiza Hanoon Yoosuf V.Attorney General** CA/121/2002 it was held that:

> *"In effect the first ground of appeal is that the prosecution failed to establish the nexus between the Heroin detected and what was produced in court. In court, the prosecution must prove the chain of custody. This must be done by establishing the nexus between the heroin detected and what was handed over to the Government Analyst for examination and report. The prosecution must prove that, what was subjected to analysis is exactly the same substance that was detected in that particular case. In this regard the inward journey of the production plays a dominant role and is most significant".*

In **Perera V. Attorney General** [1998] 1 Sri.L.R it was held:

> *"the most important journey is the inward journey because the final analyst report will depend on that".*

[13] When this Court invited the Complainant-Respondent to explain regarding weight discrepancy transpired from the evidence, the Senior Deputy Solicitor General following the best traditions and highest standard admitted the weight discrepancy in the production and further added that is unable to explain the reason.

[14] According to IP/Suresh Kumara he had handed over production to Government Analyst Ms.Chandrani who was the 11th witness in this case. He further added when he handed over the same to the Government Analyst Ms.Chandrani did a sample test and confirmed that substances contained in both parcels had been reacted for Heroin.

When Government Analyst Ms.Chandrani gave evidence, in the cross examination she had vehemently denied that she received P1 and P2 from PW01 IP/Suresh Kumara on 09/12/2004. She further added that on the said date production pertaining to this case had been received by Assistant Government Analyst Ms.Rajapaksha. No questions asked from Government Analyst Ms.Chandrani regarding the condition of the parcels and the sample test carried out at the time of receipt of the parcels to the Government Analyst Department.

The prosecution has failed to place evidence with regard to the condition of P1 and P2 when it reached the Government Analyst Department. Further the prosecution had failed to establish as to how Ms.Rajapaksha had carried out sample test before issuing the Government Analyst Receipt which was marked as P3 by the prosecution.

In this case the failure to call Assistant Government Analyst Ms.Rajapaksha has created a very serious doubt on the prosecution case.

In an identical case **Albert Deny Kunja V Attorney General** CA/92/2007 His Ladyship Justice K.K.Wickramsinghe decided on 06/07/2018 held that:

> *"However, upon perusal of the proceedings of the trial it is evident that the prosecution witness Jayamanne had handed over the production to one K.P Chandrani at the Government Analyst's Department and the Assistant Government Analyst had acquired production from said K.P. Chandrani" (Page 154 and 167 of the brief)*
>
> *"We find that one K.P.Chandrani had handled production at a subsequent stage of inward journey and she had not been called to give evidence. Therefore, the prosecution had failed to establish the chain of the custody of production beyond reasonable doubt"*

[15] In this case the Learned High Court Judge has not considered the weight variation in his judgment. Further not calling Assistant Government Analyst Ms.Rajapaksha who received the production and issued the receipt, has caused a very serious doubt on the prosecution case. As the evidence placed by the prosecution with regard to inward journey create a serious doubt and

it certainly affect the root of the case, it is unsafe to stand the conviction against the Appellant.

[16] In **Mahasarukkalige Chandani V. Attorney General** CA/213/2009 decided on 30/06/2016 His Lordship Justice Malalgoda held that:

> *"Since the court is not inclined to act on the evidence placed by the prosecution in establishing the inward journey as safe, it is not necessary for this court to consider the other grounds of the appeal raised by the Learned counsel during the argument before us".*

[17] As the prosecution had failed to establish the custody of production chain beyond reasonable doubt, it is not necessary to consider the second ground of appeal advanced by the Appellant.

[18] Due to aforesaid reasons, we set aside the conviction and sentence imposed by Learned High Court Judge of Vavuniya dated 15/11/2010 on the Appellant. Therefore, he is acquitted from both charges.

[19] Accordingly, the appeal is allowed.

[20] The Registrar is directed to send a copy of this judgment to High Court of Vavuniya along with the original case record.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J

I agree.

JUDGE OF THE COURT OF APPEAL